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IN THE
COURT OF APPEALS OF INDIANA

PURVI PATEL, Appellant, v. STATE OF INDIANA, Appellee	)	Appeals from the St. Joseph Superior Court The Honorable ____ Cause No. 71D08-1307-FA-000017

BRIEF OF *AMICI CURIAE* SOUTH ASIAN AMERICANS LEADING TOGETHER [ADDITIONAL GROUPS] IN SUPPORT OF APPELLANT

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Purvi Patel, a 33-year old Indian American woman, worked at her family's restaurant and took care of her parents and ailing grandparents. She is now also the first woman in the United States to be convicted and sent to prison for feticide for attempting to end her own pregnancy.

In July 2013, Patel went to an emergency room at St. Joseph Regional Medical Center, seeking help for vaginal bleeding. Patel did not immediately tell medical staff that she had been pregnant. When Dr. Kelly McGuire, a member of the American Association of Pro-Life Obstetricians and Gynecologists, discovered what happened, he called the police then left the hospital to join police in their search for the fetal remains.

Meanwhile, Patel remained hospitalized. When she awoke in the early hours of the morning, she was greeted by police officers who immediately began an interrogation. They demanded to know the identity of the father and asked "Was he Indian too?"

A month later, Patel was charged with feticide and neglect of a dependent—two seemingly contradictory charges. On March 30, 2015 she was convicted on both charges, and given a 41-year sentence. This Court should overturn Patel's conviction for two reasons.

First, Patel's arrest, prosecution, and conviction raise serious concerns about selective enforcement of the laws of Indiana. The only two women the State of Indiana has charged with feticide have been Asian women, although abortion and miscarriage are widespread occurrences throughout the state. Though tragic and unconstitutional, such selective enforcement is consistent with America's history of passing laws based on cultural stereotypes about the Asian community, and with selective enforcement of race-neutral laws against Asian Americans. Such selective enforcement violates the Equal Protection Clause and must not be tolerated.

Second, affirming Patel's conviction will likely deter women Asian women who are struggling with serious health conditions or medical emergencies to seek out the healthcare services they desperately need from a hospital, clinic or doctor's office out of fear that they will be reported to law enforcement officials. This will be particularly detrimental to those suffering from mental health problems, who miscarry or who suffer a still birth outside the hospital setting. In short, affirming Patel's conviction is likely to heighten the difficulties that API women already face in accessing healthcare.

For the reasons set out in Patel's brief, and in consideration of the issues outlined in this brief, this Court should reverse Patel's conviction.

ARGUMENT

The arrest, prosecution and conviction of Purvi Patel did not occur in a vacuum. They happened within a legal framework that, for centuries, has both explicitly and implicitly used stereotypes to vilify the Asian and Pacific Islander (API) community. Section I of this brief provides the necessary historical context to understand the role of stereotyping in this case.

The outcomes of stereotyping do not end, however, in the legal world. Misuse and unequal protection of the law have resulted in a long history of punitive outcomes disproportionately affecting the API community. Most troubling is the destructive power of these stereotypes on access to healthcare for the API community in the United States, which Section II of this brief will address.

I. Patel's Conviction Raises Serious Concerns About Selective Enforcement, Particularly When Viewed In The Context Of America's Legacy Of Passing And Enforcing Laws Against Asians Based On Stereotypes.

Indiana enacted its feticide law in 2009 to protect pregnant women from harm by a third party. Indiana State Senator Jim Merrit, the sponsor of the bill, specifically noted that the bill was a response to a shooting of a pregnant bank teller that resulted in the death of unborn twins. *See* Press Release, Senate Democratic Caucus, Merritt's Bill to Enhance Penalties for Feticide Passes Indiana House (April 6, 2009), *see* http://www.in.gov/portal/news_events/37749.htm. Since then, Patel is only the second woman to be prosecuted under this law. The first was also an API woman: Bei Bei Shuai, a Chinese woman who lost her pregnancy when her depression drove her to attempt suicide. Rather than taking steps to ensure she received the mental health assistance she so desperately needed, in 2011, the state of Indiana charged her with attempted feticide and murder. *See Bei Bei Shuai v. State*, 966 N.E.2d 619 (Ct. App. Ind. 2012).

For context, abortion and miscarriage are wide-spread occurrences. In Indiana in 2011, over 110,800 women became pregnant. Nine percent – or 9972 – of pregnancies resulted in induced abortions and fifteen percent – or 16,620 – of pregnancies resulted in miscarriage. Nationwide, no racial or ethnic group makes up a majority of women obtaining abortions: *See* State Facts About Abortion, Guttmacher Institute, *available at* https://www.guttmacher.org/pubs/sfaa/indiana.html.

The singling out of these two women to prosecute raises a serious question about whether Indiana is selectively enforcing its feticide law against API women. To properly answer this question, the Court first must understand the history in this country of passing and enforcing laws based on cultural stereotypes about the API community.

A. America Has A History Of Passing Laws Based On Cultural Stereotypes About The API Community.

Throughout our nation's history, members of the API community have battled a number of stereotypes. For example, APIs have been perceived as "perpetual foreigners" who are incapable of assimilation. The API community has also been seen as "Yellow Peril," a cultural threat that will denigrate the white American way of life. *See, e.g.*, Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 Pol. & Soc'y 105, 108-16 (1999) (describing history of whites perceiving Asian Americans as foreign and therefore politically ostracizing them). API women have been sexualized and exoticized throughout U.S. history while at the same time perceived as docile, quiet, and subservient. *See* Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. Gender Race & Just. 177, 186, 191 (1997). Underlying all of these stereotypes is a belief that APIs necessarily think, act, and behave in racially-determined ways.

These stereotypes have given rise to a "long history of governmental discrimination based on race" against the API community. *Ho by Ho v. San Francisco Unified Sch. Dist.*, 147 F.3d 854, 863 (9th Cir. 1998); *see also* Ernesto Hernandez-Lopez, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 Tex. Wesleyan L. Rev. 255, 269 (2008) (explaining that laws that historically restricted the rights of Chinese immigrants "relied on cultural arguments that they were a different race and had a history, biology and culture so unique and so distinct they could not assimilate"); *Oyama v. California*, 332 U.S. 633, 651-59 (1948) (Murphy, J., concurring) (noting California Alien Land Law was the result of "racial prejudices and discriminations" against "[t]he 'Japanese menace'": "The Japanese were depicted as degenerate mongrels and the voters were urged to save 'California—the White Man's Paradise' from the 'yellow peril'"). For decades, based on racial stereotypes, API individuals were excluded from entering the United States, owning land, and gaining citizenship.

During this era, many policies based on the idea of Asians as inferior and dangerous were put into place. As early as 1913, the Alien Land Law, was passed in California as a reaction to the influx of Asian immigrants and the fear engendered by the perception of this group as perpetual outsiders who threatened American culture. *See* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. Rev. 37 (1998). Justice Murphy's concurrence in *Oyama* captured the anti-Japanese sentiment animating these laws, noting the history of "[c]harges of espionage, unassimilativeness, clannishness and corruption of young children" against this group. *Oyama*, 332 U.S. at 653 (Murphy, J., concurring). Moreover, the first laws excluding immigrants from the U.S. were targeted specifically at restricting the entry of Asians into the country. *See, e.g.*, Chinese Exclusion Act

of 1882, ch. 126, 22 Stat. 58, 58-61 (prohibiting immigration of all Chinese laborers); Asiatic Barred Zone Act of 1917, Immigration Act of 1917, Ch. 29, 39 Stat. 874 (barring immigration of all Asian Indians into the U.S.); Immigration Act of 1924 (excluding nearly all immigrants from Asia); Tydings-McDuffie Act of 1934, ch. 84, 48 Stat. 456 (1934) (imposing annual quota of fifty Filipino immigrants). Congress justified each of these discriminatory laws by reference to the prejudices underlying the "perpetual foreigner" and "Yellow Peril" stereotypes. The Chinese Exclusion Act of 1882, for instance, was based on Congress's determination that:

> [T]he presence within our territory of a large number of Chinese laborers, of *a* distinct race and religion, . . . tenaciously adhering to the customs and usages of their own country . . . and apparently incapable of assimilating with our people might endanger good order, and be injurious to the public interests.

Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893) (emphasis added).

Of note, some of these laws specifically targeted API women. The Page Act of 1875, for example, was essentially used to bar Chinese women from immigrating to the country, based on a stereotype that they were prostitutes that would sully the American way of life Sec. 141, 18 Stat. 477. *See* Eithne Luibheid, *Entry Denied: Controlling Sexuality at the Border* 31-54 (1998). In fact, Congressman Alan Page who the bill was named after, sponsored the bill to "end the danger or cheap Chinese labor and immoral Chinese women." George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875-1882*, 6 J. Am. Ethnic Hist. 28, 28 (1986).

Perhaps the most egregious and infamous example of discriminatory treatment of the API community based on these stereotypes is the internment of Japanese Americans during World War II, which the Supreme Court upheld in 1944. *Korematsu v. United States*, 323 U.S. 214 (1944). As the dissent in *Korematsu* noted, justification for the internment order was sought, not on the basis of actual data, but "upon [the] questionable racial and sociological grounds . . . [that]

individuals of Japanese ancestry . . . are a large, unassimilated, tightly-knit racial group, bound to an enemy nation by strong ties of race, culture, custom, and religion." *Id.* at 236-37 (Murphy, J. dissenting). Critically, although Germany and Italy were enemies during World War II, the United States did not accord similar treatment to German Americans or Italian Americans.

As Asian Indians, particularly Sikhs, began moving into the U.S. Pacific Northwest and California in the early 1900s, it became clear that the "perpetual foreigner" stereotype was not just limited to APIs of Japanese and Chinese descent, but to all APIs equally. The response to the so-called "Hindu invasion" or "Turban tide" was swift and vicious. Nativist rioters swept through Asian Indian settlements in Washington State in 1907 and protectionist and racist groups —as epitomized by the Asian Exclusion League—proliferated well into the following decade. *See* University of Washington, Seattle Civil Rights & Labor History Project, *available at* http://depts.washington.edu/civilr/bham_history.htm. The aftermath of this backlash can be seen in laws like the Asiatic Barred Zone Act of 1917, which targeted Indians for exclusion from immigration into the United States. *See generally* Erika Lee, At America's Gates: Chinese Immigration During the Exclusion Era, 1882-1943 (2003).

In 1923, the Supreme Court case of *United States v. Bhagat Singh Thind* established that Hindus (at the time, a proxy for those from the South Asian subcontinent) could not be granted citizenship through naturalization based on their Caucasian ancestry because they were not "white person[s]" within the meaning of the Naturalization Act. 261 U.S. 204 (1923). The U.S. Supreme Court concluded that "Caucasian," had come to mean "white persons" in the United States, a normative category in which individuals from the South Asian subcontinent did not belong. As the Court's discussion amply demonstrated, this determination was made largely on the perceived "otherness" of South Asians. *Id.* at 210-211. "[T]he original framers of the law,"

the Court held, meant to allow immigration "from the British Isles and Northwestern Europe, whence they and their forebears had come." *Id.* at 213. "[T]hey extended the privilege of American citizenship to . . . bone of their bone and flesh of their flesh—and their kind." *Id.* Such immigrant groups were "readily amalgamated" with those already here; in contrast "children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry." *Id.* at 213, 215.

More recently, in the wake of the September 11, 2001 attacks, South Asian men, in particular, have increasingly faced government scrutiny based on their race, national origin, and religion. Immediately after the attacks, the National Security Entry-Exit Registration System (NSEERS) was initiated to track border entries and exits, and allowed the government to systematically target Arabs, Middle Easterners, Muslims, and South Asians from designated countries for enhanced scrutiny. The most controversial piece of NSEERS required nonimmigrant males who were 16 years of age and older from 25 specific countries to register at local immigration offices for fingerprinting, photographs, and lengthy, invasive interrogations. More than 80,000 men underwent call-in registration and thousands were subjected to interrogations, detention, and deportation yet these efforts have not resulted in a single known terrorism-related conviction. *See* The "NSEERS Effect: A Decade of Racial Profiling, Fear, and Secrecy," Rights Working Group and Penn State Law (2012), available at https://pennstatelaw.psu.edu/_file/clinics/NSEERS_report.pdf; Special Registration: Discrimination and Xenophobia as Government Policy, Asian American Legal Defense and Education Fund (2004), *available at* http://www.aaldef.org/docs/AALDEF-Special-Registration-2004.pdf; SAALT, *In Our Own Words*: *Narratives of South Asian New Yorkers*

Affected by Racial and Religious Profiling (2012), available at http://saalt.electricembers.net/wp-content/uploads/2012/09/In-Our-Own-Words.pdf.

B. America Also Has A History Of Selectively Enforcing Race-Neutral Laws, In Violation Of The Equal Protection Clauses Of The U.S. And Indiana Constitutions.

In some ways more pernicious than the historic, explicitly discriminatory measures discussed above, the API community has long been targeted with unconstitutional selective enforcement of laws that are ostensibly race-neutral. The well-known case of *Yick Wo v. Hopkins*, for instance, concerned a San Francisco ordinance that banned operating hand laundries in wooden buildings. 118 U.S. 356 (1886). Although the ordinance purported to apply equally to all citizens, it, in fact, targeted Chinese immigrants. *Id.* at 373-74. Sadly, such unconstitutional selective race-based enforcement is not a thing of the past. In 2013, a court found that the Maricopa County Sheriff's Office—helmed by Sheriff Joe Arpaio—had an unconstitutional policy of questioning, investigating, and detaining Latino drivers and passengers, that the office received such training from the Immigration and Customs Enforcement Office of the U.S. Department of Homeland Security. *See Melendres v. Arpaio*, 989 F. Supp. 2d 822, 825, 846 (D. Ariz. 2013) *adhered to*, No. CV-07-02513-PHX-GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013) *aff'd in part, vacated in part*, 784 F.3d 1254 (9th Cir. 2015) and *aff'd*, 784 F.3d 1254 (9th Cir. 2015). That same year, a court across the country found that New York City implemented its stop-and-frisk policy in an unconstitutional manner that targeted young black and Latino individuals. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013), *appeal dismissed by* 770 F.3d 1051 (2d Cir. Oct. 31, 2014). Both courts permanently enjoined the practices in question. *See Melendres*, 989 F. Supp. 2d at 912; *Floyd v. City of New York*, 959 F. Supp. 2d 668, 673 (S.D.N.Y. 2013).

Such laws and programs – enforced in a discriminatory manner – violate the Equal Protection Clause of the United States Constitution. *See Yick Wo*, 118 U.S. at 373-74. Such laws and programs also violate the Indiana Constitution's Equal Protection Clause. *State ex rel. Miller v. McDonald*, 297 N.E.2d 826, 829 (Ind. 1973) (state equal protection clause coextensive with federal clause); *see also St. Joseph County v. Wilmes*, 428 N.E.2d 103, 105 (Ind. Ct. App. 3d Dist. 1981) ("A statute which is constitutional may nevertheless be unconstitutionally applied."). As the Supreme Court of Indiana has recognized, "parties [may] challenge government action that categorizes citizens into particular groups and then treats those groups differently," if the law is "facially neutral but applied in a way that disparately impacts an identifiable class." *City of Indianapolis v. Armour*, 946 N.E.2d 553, 564 (Ind. 2011) (citing *Yick Wo*). Indeed, "wrongful discrimination between persons in similar circumstances[] is at least as vicious" in selective enforcement cases as it is in statutory law. *Western Union Tel. Co. v. Ferguson*, 60 N.E. 674, 677 (Ind. 1901).

C. That Indiana Has Enforced Its Feticide Law Against Only Two Pregnant Women For Their Pregnancy Outcomes—Both API Women—Is Troubling and Constitutionally Suspect.

As other Amici will argue, Indiana's feticide law does not and was not intended to apply to people in relation to their own pregnancies. The fact that the only two people known to have faced such a prosecution are both API women in a state where they are a small minority raises the concern that the state is engaged in selective enforcement as a result of discriminatory stereotypes. Moreover, that both of these people are pregnant women themselves—and not third parties—suggests that the State is stretching the statute beyond its intended bounds. This conduct raises further suspicions regarding selective enforcement.[1]

[1] The United States Supreme Court has recently reversed a number of criminal convictions in which prosecutors employed a statute beyond its intended reach. *See, e.g.*, *Yates v. United*

Patel's and Shuai's cases come amid a resurgence of stereotypes of API women related to their reproductive health choices. Citing the tragic trend of son preference in India and China, the narrative about Indian and Chinese women among anti-abortion activists is increasingly that these are women who have a blatant disregard for life. *See* Sayantani Dasgupta, Pregnant Women Are Now Targets: The Tragedy of Purvi Patel, *available at* http://www.salon.com/2015/04/26/a_terrifying_floodgate_for_prosecuting_women_why_purvi_patel_is_not_a_terrorist_partner/. This narrative, combined with the stereotype of APIs as "perpetual foreigners" and "Yellow Peril," has resulted in the perception that APIs in the U.S. have inherited this problematic cultural flaw. It is impossible to ignore that these stereotypes may have played a role when Indiana singled out only Patel and Shuai, both API immigrant women, for prosecution.

Indeed, racial assumptions regarding API women were a part of public discourse in Indiana during Patel's sentencing hearing in February of 2015. That month, the Indiana Senate passed a ban on abortions performed for the purpose of selecting a baby's sex.[2] *See* https://iga.in.gov/legislative/2015/bills/senate/334*;* Shivana Jorawar, *Miscarriage of Justice: Asian-American Women Targeted – and All Women Threatened – by Feticide Laws Like Indiana's*, American Prospect, Apr. 3, 2015, *available at* http://prospect.org/article/miscarriage-

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States, 135 S. Ct. 1074, 1078-79 (Feb. 25, 2015) (fisherman convicted of a provision of the Sarbanes-Oxley Act of 2002 for "destruction or removal of property to prevent seizure" when he threw an "undersized red grouper" overboard "to prevent authorities from confirming he had harvested undersized fish"); *Bond v. United States*, 134 S. Ct. 2077 (June 2, 2014) (Chemical Weapons Convention Implementation Act did not reach "an amateur attempt by a jilted wife to injure her husband's lover"). This is consistent with the rule that criminal statutes should be resolved in favor or lenity. *See Skilling v. United States*, 561 U.S. 358, 409-11 (2010) (honest services fraud statute covered only bribery and kickback schemes, not "undisclosed self-dealing" or conflicts of interest).

[2] Because the Indiana General Assembly has no recorded legislative history, amici rely on public statements and look to other legislatures to understand the motivation behind such bills.

justice-asian-american-women-targeted-and-all-women-threatened-feticide-laws. Sex-selective abortion bans—laws banning abortions resulting from the desire to control the sex of one's children—are now proliferating in the United States. Over twenty-one states as well as the federal government have considered such laws since 2009. *See* The Univ. of Chi. International Human Rights Clinic, et al., Replacing Myth With Facts: Sex Selective Abortion Laws in the United States 1 (2014) (hereinafter "*Replacing Myths*"), *available* at https://napawf.org/wp-content/uploads/2014/06/Replacing-Myths-with-Facts-final.pdf. An echo of the reactionary immigration policies of the 1800s and 1900s, states where sex-selective abortion laws have been introduced or passed are also states with some of the fastest growing API populations in the country, such as Arizona (92% growth between 2000 and 2010), North Dakota (92%), and North Carolina (84%). *See id.* at 29-30 (listing states with sex-selective abortion bans); Elizabeth M. Hoeffel, et al., The Asian Population: 2010, Table 2, *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf (listing Asian population percent change between 2000 and 2010, by state). Indeed, Indiana considered its sex selection abortion ban after a period of massive growth of APIs—from 2000 to 2010, the API community in Indiana grew by 74 percent, which represents the largest percentage growth for the API community in the Midwest. Asian American Center for Advancing Justice, A Community of Contrasts: Asian Americans, Native Hawaiians and Pacific Islanders in the Midwest 7 (2012), *available at* http://napca.org/wp-content/uploads/2014/04/Community_of_Contrasts_Midwest_2012.pdf.

Despite evidence that API women in the United States have *more* girls on average than white Americans, *Replacing Myths* at 16, debates around sex-selection bans have relied heavily on race-based stereotypes of API women, with a specific focus on women of Chinese and Indian

descent. For example, during legislative debates in South Dakota before it enacted a ban on sex-selective abortion, an executive of South Dakota Right to Life suggested that Asian Americans in South Dakota are "from ethnic backgrounds that are *known* to practice sex selection." *Id.* at 15. Likewise, upon passage of the ban in Arizona, state Senator Barto stated, "We are a multicultural society now and cultures are bringing their traditions to America that really defy the values of America, including cultures that value males over females." Associated Press, Arizona Law Bans Abortions Based on Race or Gender, (Mar. 31, 2011), *available at* http://www.foxnews.com/politics/2011/03/31/arizona-law-bans-abortions-based-race-gender/.

Like others of its kind, the proposed Indiana ban was based on stereotypes about women originating from countries in Asia. For example, one witness testified before the Indiana Senate that "[t]here is ample evidence to show that gender selection abortion occurs in such countries as China and India" and that "this problem also occurs in the United States." *See* Written Testimony of David A. Prentice, PhD, in support of SB 334, *available at* https://www.lozierinstitute.org/wp-content/uploads/2015/02/Prentice-Senatetestimony-SB334-IN-Final.pdf.

The language used by sponsors and supporters of such bills, suggesting that API women as a group possess shared racial characteristics that make them a threat to American values and society, mirrors the racist and xenophobic language that drove anti- Asian measures in the late 19th and early 20th century in this country. *See Oyama*, 332 U.S. at 668-69 (Murphy, J., concurring) ("[Japanese] are said to constitute a menace, a 'yellow peril,' to the welfare of California. They are said to be encroaching on the agricultural interests of American citizens. They are said to threaten to take over all the rich farm land of California. They are said to be so efficient that Americans cannot compete with them." (describing legislative history of Alien

Land Law)); *Korematsu*, 323 U.S. at 237-38 (Murphy, J., dissenting) ("Individuals of Japanese ancestry are condemned because they are said to be a 'large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.'") (internal citations omitted).

The debate surrounding Indiana's proposed sex selective abortion ban created a narrative in the state that Chinese and Indian women have a disregard for the life of unborn children. These stereotypes may have come into play when the doctor, who belonged to an anti-abortion medical organization, left Patel's bedside to report her to the police and aid in the investigation, when investigators inquired into the identity of the father, asking Patel, "Was he Indian too?," and when the prosecutors made their charging decision.

II. This Court Should Guard Against Discrimination And Selective Prosecution Because Women Similarly Situated Will Avoid Seeking Medical Assistance, Compounding Existing Barriers To Health Care.

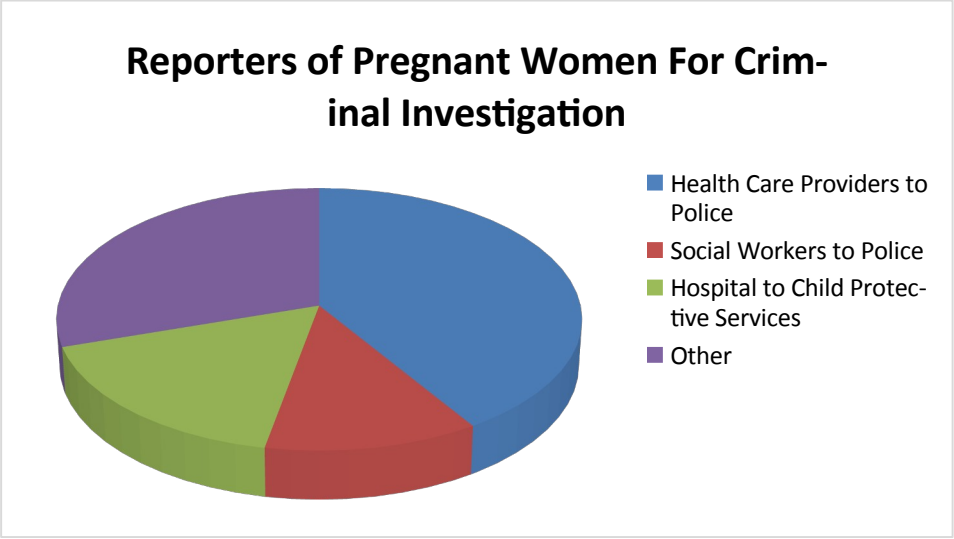
Affirming Patel's conviction will reduce the likelihood that pregnant API women struggling with serious health conditions or medical emergencies will seek out the care and treatment they desperately need. API women already face numerous hurdles to accessing culturally competent, timely, and affordable health care. The threat of unwarranted increased scrutiny and the report of their private medical information to law enforcement will be particularly detrimental to women struggling with mental health, those who miscarry, or who suffer a still birth outside the hospital setting.

A. Women Of Color Disproportionately Experience Punitive Action Resulting From Their Pregnancy-Related Behaviors, Which Deters Them From Seeking Medical Attention.

Affirming Patel's conviction will heighten the existing fear among API women of punitive actions and chill their efforts to access necessary medical care. It is well-documented

that pregnant women avoid seeking medical treatment when they fear punitive actions. *See, e.g.*, Martha A. Jessup, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. Drug Issues 285 (2003); Sarah Roberts, *"You Have to Stop Using Before You Go to the Doctor": Barriers to Prenatal Care for Women Who Use Drugs During Pregnancy*, Presentation at Am. Public Health Ass'n Meeting (Nov. 6, 2006), *available at* https://apha.confex.com/apha/135am/techprogram/paper_149351.htm.

Low-income women of color already have reason to fear punitive actions relating to seeking healthcare for their pregnancy-related condition. In reported cases of arrest or forced medical intervention of pregnant women (for a reason relating to their pregnancy), a shockingly high proportion resulted from reports from health care providers or social work professionals: 41% of these cases were reported to the police by health care providers, 12% were reported from social workers; and 17% were reported from the hospital to Child Protective Services and then to law enforcement. Lynn M. Paltrow & Jeanne Flavin, The Policy and Politics of Reproductive Health, Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health, Journal of Health Politics, Policy, and Law, Vol. 38, No. 2, at 311, Table 1 (Apr. 2013) (hereinafter "Policy and Politics").


Reporters of Pregnant Women For Criminal Investigation
Health Care Providers to Police
Social Workers to Police
Hospital to Child Protective Services
Other

In many cases, hospital staff voluntarily disclosed information to police and prosecutors despite principles of patient confidentiality and without a court order. *Id.* at 329.

The facts of *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), demonstrate the lengths to which some medical professionals will go to assist in the investigation and prosecution of pregnant women. Concerned about an increase in the use of cocaine by patients receiving prenatal treatment, the Medical University of South Charleston (MUSC) began to order, without consent and without a warrant, that drug screens be performed on urine samples from maternity patients suspected of using cocaine. *Id.* at 69. This testing was a policy developed by MUSC representatives and the police, which used "the threat of law enforcement intervention" as "the necessary leverage to make the policy effective." *Id.* at 71-72 (quotation marks omitted). MUSC obstetrics patients who were arrested after testing positive for cocaine sued, alleging that the "warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were unconstitutional searches." *Id.* The Supreme Court agreed. *Id.* at 76. Although this particular practice is no longer in place, it illustrates that, in cases involving pregnant women, medical professionals may violate step outside of their role as healthcare providers and participate in law enforcement functions.

This case can only be understood within the context of a larger disproportionate focus on pregnant women of color. In a study of women who were arrested or received forced medical interventions relating to their pregnancies, low income pregnant women of color experienced such interventions at a disproportionate rate as compared to white women; the majority of such cases – 59 percent – involved women of color. Policy and Politics, *supra*, at 311. The overwhelming majority of these women were economically disadvantaged; 71 percent of the cases involved socioeconomically-disadvantaged women (as measured by entitlement to indigent

defense). *Id.* at 311. The study found that "[h]ospital-based health care providers and social workers appear more likely to disclose information about patients of color." *Id.* at 327.

Modern medical interventions on women of color draw on a shameful history of forced sterilizations. From the 1920s through the 1970s, 31 states had government run eugenics programs forcibly sterilizing women of color without their knowledge. Often, it would be women who would seek medical assistance for an abortion and found themselves coerced into sterilization as the most effective way to avoid future pregnancies. During this period, 65% of sterilizations performed in North Carolina were on Black women who represented only 25% of the total population. By the 1970s, up to 25% of Native American women ages 15-44 were forcibly sterilized. A 1965 survey of Puerto Rican residents found that about one-third of all Puerto Rican mothers, ages 20-49, were sterilized. While these women of color were forcibly sterilized, Asian American women have been historically victimized, stereotyped, and criminalized in unique ways for their reproductive choices, along this same spectrum of racist practices and policies.

Moreover, immigrant women over the last decade have been targets of punitive policy measures based on the xenophobic belief that they have come to the U.S. to give birth to citizen children and take advantage of public benefits. *See* Priscilla Huang, Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies, 2 Harv. L. & Pol'y Rev. 385 (2008). Reports of the sudden and forcible detention and deportation of pregnant immigrant women have raised questions of whether pregnancy has become a red flag for removal by Immigration and Customs Enforcement (ICE) officials. One story in particular illustrates this trend. On February 7, 2006, Ms. Jiang Zhen Jiang and her family arrived at an immigration office for what she thought was a routine

interview. While her husband and two sons waited for her in the lobby of the immigration office, ICE officials escorted her into a minivan and drove her to New York's JFK Airport for immediate deportation back to China. ICE agents held Ms. Jiang for eight hours, denied her food, and refused to provide her with medical care until she begged for help in a public waiting area at the airport. Eventually, Ms. Jiang was taken to a hospital, where doctors found that she had miscarried her twin fetuses. At the time of the attempted deportation, Ms. Jiang had lived in the United States as an undocumented immigrant since 1995. Outraged by her treatment, a community of Asian-American activists and residents in the greater Pennsylvania area launched a campaign to bring national attention to Ms. Jiang's experience. Similar reports of immigrant pregnant women targeted for removal continue to surface in the media. *See id*. at 401-02.

Such disproportionately punitive responses discourage women from seeking medical care due to fear of stigmatization or law enforcement intervention. *See* Policy and Politics, at 330-31. This explains the "medical and public health consensus that punitive approaches undermine maternal, fetal, and child health by deterring women from care and communicating openly with people who might be able to help them." *Id.* at 332 (citing sources). Additionally, undocumented immigrants may delay or avoid seeking medical treatment for fear that doing so will "lead to trouble with immigration authorities." Steven Asch, Barbara Leake & Lillian Gelberg, Does Fear of Immigration Authorities Deter Tuberculosis Patients From Seeking Care?, Western J. Med. Vol. 161, No. 4, p. 373 (Oct. 1994). In short, punishing API women for seeking medical care will likely deter pregnant women of color from seeking healthcare services, undermining rather than advancing the state's interest in public health.

B. Immigrant API Women Already Face Disparities In Accessing Healthcare Due To Lack Of Insurance, Language Barriers And Immigration Restrictions.

Affirming Patel's conviction will mean that API women, in particular, will likely be deterred from seeking medical care, exacerbating the already existing disparities in healthcare access for API women. An estimated 14.5% of APIs are uninsured, compared with 13.4% of all Americans and 9.8% of Whites. Jessica C. Smith & Carla Medalia, U.S. Census Bureau, *Health Insurance Coverage in the United States: 2013*, at 2, 10 (Sept. 2014), *available at* http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-250.pdf. Roughly 15% of APIs participate in Medicaid. *Id.* at 10.

APIs are the fastest growing group of poor in the country, making access to affordable, quality health care difficult—if not impossible—for many API women. Twelve percent of API women in the U.S. live in poverty compared to 10% of white women. *See* National Asian Pacific American Women's Forum, The Hyde Amendment & Asian American & Pacific Islander Women (June 2015), available at https://napawf.org/wp-content/uploads/2015/07/HydeOne-Pager_FINAL.pdf. The statistics for South Asian women are even bleaker: of the 4.3 million South Asians in the U.S., 21.9% of Bangladeshi, 16.6% of Pakistani, 11.2% of Sri Lankans, and 8.0% of Indian women are living in poverty. 2006-2010 American Community Survey 5-year estimates, Table B20005. Across these South Asian groups, the percentage of women earning less than $12,500 annually was double that of South Asian men. South Asian Americans Leading Together, Demographic Characteristics of South Asians in The United States: Emphasis on Poverty, Gender, Language Ability, and Immigration Status, available at http://saalt.electricembers.net/wp-content/uploads/2012/09/Demographic-Characteristics-of-SA-in-US-20001.pdf.

Language and cultural barriers also prevent API women from accessing medical care. Seventy-one percent of APIs speak a language other than English at home 32% are limited English proficient. *See* Asian & Pacific Islander American Health Forum et al., Improving the Road to ACA Coverage: Lessons Learned on Outreach, Education, and Enrollment for Asian American, Native Hawaiian, and Pacific Islander Communities 10 (2014), *available at* http://www.apiahf.org/sites/default/files/2014.10.14_Improving%20the%20Road%20to%20ACA%20Coverage_National%20Report.pdf. Language barriers make every step of accessing care a challenge, from locating a healthcare facility, to booking an appointment, to communicating with health professionals, to even the basic act of acquiring knowledge. *See* Wooksoo Kim & Robert H. Keefe, Barriers to Healthcare Among Asian Americans, Social Work and Public Health, Vol. 25, p. 286, 289 (2010). Lack of cultural competency among health care providers is yet another barrier for API women seeking healthcare. For example, expressions of illness may be culturally-specific and may be lost or remain unnoticed even without a language barrier. *See id.*

Lack of access to medical care is particularly acute for API immigrants. Rates of insurance coverage are significantly lower for non-citizens than for citizens—the proportion of the noncitizen population without health insurance is *three times* that of native-born citizens. Smith, supra, at 12. Undocumented immigrants are completely shut out of the Affordable Care Act insurance marketplaces and must purchase insurance, if at all, out of pocket. With the decline in funding for safety net hospitals providing emergency services, sources of care for this population of immigrants is dwindling fast. There are approximately 11.3 million undocumented individuals of Asian origin living in the United States. Bryan Baker & Nancy Rytina, U.S. Dep't of Homeland Security, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012, at 4 (Mar. 2013), *available at*

http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf. More than 5.3 million are immigrant women. Nat'l Asian Pacific Amer. Women's Forum, Ensuring Health Access and Equity for Immigrant Asian American and Pacific Islander Women (Mar. 2015), *available at* https://napawf.org/wp-content/uploads/2009/10/AAPIWomenHealthAccessEquity_IssueBrief2015.pdf.

Even legally-present immigrants face unique barriers to healthcare. Almost all legally-present immigrants are ineligible to receive Medicaid or coverage through Children's Health Insurance Program during the first five years of their lawful residency. *See* Kinsey Hasstedt, *Toward Equity and Access: Removing Legal Barriers to Health Insurance Coverage for Immigrants*, Guttmacher Policy Rev., Vol. 16, No. 1, Winter 2013 (hereinafter "Toward Equity"), *available at* https://www.guttmacher.org/pubs/gpr/16/1/gpr160102.html.

This five-year ban has a significant impact on women, who generate less income than men and require health services that men do not. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2788 (2014) (Ginsburg, J., dissenting) (noting that "women pa[y] significantly more than men for preventive care" and "cost barriers operate to block many women from obtaining needed care at all"). Asian American women working full time, year round make 79 cents for every dollar paid to white, non-Hispanic men, and 74 cents for every dollar paid to Asian American men. *See* National Women's Law Center, Closing the Wage Gap is Crucial for Women of Color and Their Families 3 n.2 (Apr. 2015), *available at* http://www.nwlc.org/sites/default/files/pdfs/closing_the_wage_gap_is_crucial_for_woc_and_their_families_2015.pdf. States may choose to waive the five-year ban for immigrant pregnant women and immigrant children, but not all do. Toward Equity, *supra*. As of January 2013, only

20 states have opted to provide this gap coverage. *Id.* Indiana is not among them. *Id.* The ban's impact on API women is even further compounded by the economic insecurity resulting from language barriers, the complexity of their immigration status, the responsibility of caring for extended family members, concentration in low-paying jobs, and ineligibility for many public benefits programs. *See* Sophia Kerby, Center for American Progress, How Pay Inequality Hurts Women of Color 5 (Apr. 9, 2013), *available at* https://cdn.americanprogress.org/wp-content/uploads/2013/04/KerbyPayEquity-1.pdf.

Beyond the simple mechanics of access, immigrant APIs are also more likely to distrust their providers due to insecurity around their immigration status or their families. A 2012 study conducted by the U.S. Department of Health and Human Services found that a fear of mistreatment and deportation deters even legally-present immigrants from seeking services that potentially bring them into contact with law enforcement. *See* Krista M. Pereira, et al., U.S. Dep't of Health & Human Services, Office of the Assistant Secretary for Planning and Evaluation, Barriers to Immigrants Access to Health and Human Services Programs (May 2012), *available at* http://aspe.hhs.gov/hsp/11/ImmigrantAccess/Barriers/rb.shtml#climates. Even in mixed status families, where some individuals may have status and some may not, non-citizen parents will forgo public benefits for their U.S. citizen children, rather than risk exposure to immigration enforcement authorities. *Id.* Understandably, this anxiety and reluctance to seek assistance and care has exacerbated health disparities for immigrant communities. *See, e.g.*, Karen Hacker et al., The Impact of Immigration and Customs Enforcement on Immigrant Health: Perceptions of Immigrants in Everett, Massachusetts, USA, Social Science & Medicine, Vol. 73, Issue 4, Aug. 2011, *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3159749/ (describing how this climate of fear in immigrant communities exacerbates chronic diseases,

causes stress and depression, and decreases participation in community and public health initiatives).

Allowing Patel's conviction to stand will confirm the fear that many immigrants already have around the intersection of health and law enforcement. Giving legitimacy to Patel's deplorable treatment by her health care providers and Indiana law enforcement will only serve to make it even less likely that immigrant APIs will seek out care and treatment when they need it most. In short, API immigrant women experience grave disparities in accessing healthcare.

* * *

Patel's arrest, prosecution, and conviction is troubling and constitutionally suspect, given that stereotypes may have led to discriminatory enforcement against API women. Moreover, affirming will likely reduce the likelihood that pregnant API women who are struggling with serious health conditions or medical emergencies will seek out the healthcare services they desperately need from a hospital, clinic or doctor's office out of fear that they will be reported to law enforcement officials.

CONCLUSION

For the reasons stated herein, this Court should reverse Ms. Patel's conviction.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Indiana Rule of Appellate Procedure 44, Brief of *Amici Curiae* South Asian Americans Leading Together complies with the typeface and length requirements and contains ___ words.

Dated: September 18, 2015

Respectfully submitted,

s/Devi Rao___

CERTIFICATE OF SERVICE

I, Devi M. Rao, an attorney, hereby certify that I caused copies of the foregoing Brief of *Amici Curiae* South Asian Americans Leading Together to be served on the following individuals on September 18, 2015 via the U.S. Postal Service, first class mail postage prepaid:

s/Devi M. Rao